Filed 3/15/17 P. v. Penn CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TYRONE PENN, Defendant and Appellant.	D070506 (Super. Ct. No. SCD266753)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel F. Link, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant pleaded guilty to burglary (Pen. Code,[1] § 459; count 1), and to resisting an officer (§ 148, subd. (a)(1)), and admitted a strike prior dating back to 2006 (§ 667, subds. (b)-(i)). In return for defendant's guilty plea, the court struck the strike prior, sentenced defendant to 365 days of local time and granted defendant three years' probation.

On appeal, defendant objects to probation condition 6(n), which requires defendant "[s]ubmit person, vehicle, residence, property, personal effects, *computers and recordable media* . . . to search at any time with or without a warrant, and with or without reasonable cause, when required by [probation officer] or law enforcement officer." (Italics added.) Specifically, defendant challenges the italicized portion of condition 6(n) concerning computers and recordable media. He contends its imposition is unreasonable and violates his constitutional right to privacy because "[t]here was no evidence of any use of computers, cell phones, or any other recordable media related to this offense." As we explain, we disagree and affirm the judgment of conviction.

FACTUAL OVERVIEW[2]

On April 27, 2016, at about 12:30 a.m., defendant "opened a conex container full of construction equipment" located on Wightman Street in San Diego. The equipment belonged to a construction company. Defendant removed a generator valued at about

---

1 All further statutory references are to the Penal Code.

2 Because defendant pleaded guilty and is not challenging the admissibility or sufficiency of the evidence, we only briefly discuss the facts of this case, which are taken from the probation report.

$600 from the container and placed it on a cart he had brought with him. While leaving the construction site, police confronted him. Defendant fled on foot.

About three hours later, defendant returned to the scene and found the generator still on the cart. Defendant attempted to steal the generator a second time but this time police apprehended and arrested him.

After being admonished, defendant admitted seeing the generator earlier the preceding day and returning in the middle of the night to steal it. In a subsequent interview at the South Bay Detention Facility, defendant stated he planned to use the generator for his " 'Mr. fix it' business because he needed money to feed his family." During this same interview, defendant "acknowledged he had issues with abusing drugs and failing to report to probation in the past." However, defendant believed things were going to be different going forward because he had a "new woman" and was more "settled" than before.

The record shows defendant has a lengthy criminal history, starting when defendant was about 15 years old. Specifically, the record shows that in December 2002, defendant was charged under section 245, subdivision (a)(1) for shooting at "kids with a BB gun," which included a BB striking a victim near the victim's left eye; that five-months later, defendant violated probation in connection with the December 2002 offense after he left his court-ordered placement without permission; that in May 2003, defendant was charged for stealing a "candy box containing $200 from a girl selling candy at a fundraiser for her church," in violation of section 484, subdivision (a); that a month later, defendant was charged for taking a shirt from a store without paying for it, and on arrest,

was found in possession of "cigars, cigarettes, and a baggie containing 2.3 [grams] of marijuana"; that in March 2004, defendant was charged under section 243.6 for striking an instructional behavioral aid who attempted to restrain defendant after defendant and another student became involved in a physical altercation in the classroom; that in June 2004, defendant was charged with breaking into a car and taking a "bag," and on contact, was found to be in possession of a " 'leather man's' knife with small tools and the victim's vehicle registration," in violation of sections 459 and 496, subdivision (a); that in connection with the June 2004 offense, defendant was charged for leaving his court-ordered placement without permission, in violation of his probation; that also in June 2004, defendant was charged with burglary in violation of section 459 when his fingerprints were found on a window and on broken glass, after the victim came home and found his home burglarized and after police determined the suspects "forcibly entered the victim's home by breaking a rear window and ransacked the entire house"; that two months later in August 2004, defendant was charged under section 211 for taking $47 from the victim's wallet; that in connection with the August 2004 offense, defendant was removed from a juvenile camp because of "disruptive and defiant behavior," in which he accumulated 19 rule violations and seven level-three violations; that in April 2005, defendant was charged for violating section 245, subdivision (a)(1) after he struck the victim in the face "several times," knocked her unconscious and broke her nose because the victim allegedly was "disrespecting him"; that in connection with the April 2005 offense, defendant was charged for violating section 136.1, subdivision (a)(1) after he told the victim that, if she told anyone what had happened, he would "kill

her"; that in December 2005, as noted *ante*, defendant and two others were convicted of robbery after they overpowered a 13-year-old victim and stole his wallet, leading to his first strike prior; that in June and again in August 2013, defendant was found in possession of a glass pipe with residue; that in January 2014, defendant was found in possession of .55 and .22 grams of methamphetamine; that in December 2014, January, February, May, and November 2015, defendant was found in possession of a controlled substance; that in July 2015, defendant was charged with fighting in a public place, in violation of section 415, subdivision (1); and finally, that in April 2016, defendant was charged with the instant offense.

The probation report noted that at the time of the instant offense, defendant was on "summary probation" in three different cases; and that, as a result of his repeated "probation violations, repeated failures to appear in Court, and continued criminal activity, the defendant's adjustment to adult probation [was] also extremely poor." That report further noted defendant had violated "parole several times and was returned to finish his term"; that after his discharge in January 2013, "he continued to commit new crimes" and, thus, that "his adjustment appears unsatisfactory"; that in the past, he had been to four residential treatment programs; and that, although he acknowledged he was "documented" as a gang member by local law enforcement agencies with the moniker "Walnut," he claimed not to be in a gang but stated several of his family members were documented gang members.

The probation report recommended defendant serve *six years* in state prison. This recommendation was based on defendant's strike prior, his criminal history, "his determination to steal the generator even after the police did not arrest him at his first theft attempt, and given the fact that he does not believe he needs [substance abuse] treatment." Despite the recommendation, as noted, the court sentenced defendant to local time and three years' probation.

At sentencing, the record shows defendant objected to probation condition 6(n) only with respect to it "extending to [his] cell phone." Based on defendant's extensive criminal history, his strike prior and his behavior in connection with the instant case, the court found the Fourth Amendment waiver "relevant" and refused to put any "restrictions on it."

DISCUSSION

We note defendant wisely does *not* challenge the general "Fourth waiver" probation condition, requiring him to submit to searches of his home, person, vehicle, property and effects. Given his extensive criminal and substance abuse history, and given he twice tried to steal the generator in the instant case, he could not effectively make such a challenge. Instead, defendant challenges the search condition in 6(n) only as it relates to computers and recordable media.

A. *Guiding Principles*

A grant of probation is an act of clemency in lieu of punishment. (*People v. Moran* (2016) 1 Cal.5th 398, 402.) Probation is a privilege, and not a right. A court has broad discretion to impose "reasonable conditions, as it may determine are fitting and

proper to the end that justice may be done, that amends may be made to society for the breach of the law, . . . and generally and specifically for the reformation and rehabilitation of the probationer . . . ." (§ 1203.1, subd. (j); *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*).) "If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens." ' " (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355 (*O'Neil*).)

A condition of probation will not be upheld, however, if it (1) has no relationship to the crime of which the defendant was convicted, (2) relates to conduct that is not criminal, *and* (3) requires or forbids conduct that is not reasonably related to future criminality. (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*); see *People v. Lent* (1975) 15 Cal.3d 481, 486.) Our high court has clarified that this "test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.)

However, "[j]udicial discretion to set conditions of probation is further circumscribed by constitutional considerations." (*O'Neil*, *supra*, 165 Cal.App.4th at p. 1356.) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the

defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

"Generally, we review the court's imposition of a probation condition for an abuse of discretion." (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.) However, we independently review constitutional challenges to a probation condition. (*Ibid.*)

In *People v. Appleton* (2016) 245 Cal.App.4th 717, 723 (*Appleton*), on which defendant relies, the court rejected a similar search condition on the premise that *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473, 2493] (*Riley*), a case on which defendant also relies, held that police could not ordinarily search a smartphone incident to arrest, and that, absent other exigent circumstances, a warrant was required to make such a search. The *Riley* Court based its decision in large part on the extent of personal information now contained in such electronic devices.

However, this court in *People v. Nachbar* (2016) 3 Cal.App.5th 1122 (*Nachbar*), recently disagreed with *Appleton*. *Nachbar* involved imposition of the identical search condition at issue in the instant case. We recognize that our high court has granted review in *Nachbar*[3] pending resolution of *In re Ricardo P.* (2015) 241 Cal.App.4th 676 (review granted Feb. 17, 2016, S230923). Pending further direction from our high court, we continue to adhere to the views we expressed in *Nachbar*, namely, that the "privacy

---

3 The court granted review in *Nachbar* on December 14, 2016 (S238210).

concerns voiced in *Riley* are inapposite in the context of evaluating the reasonableness of a probation condition." (*Nachbar*, at p. 1129.)

The court in *Appleton* struck a probation condition allowing probation access to recordable media and computers based on the fact personal information may be on such devices, thus making the intrusion too broad. (See *Appleton*, *supra*, 245 Cal.App.4th at pp. 728-729.) As we have noted, the court in *Appleton* relied heavily on the discussion in *Riley*, *supra*, 134 S.Ct. 2473, about the privacy interests an individual has in his or her smartphone, to find a search warrant was required to access this and similar devices.

The *Riley* Court did not hold that electronic devices are immune from search, but only that they cannot be searched incident to lawful arrest as an ordinary exception to the warrant requirement. (See *Riley*, *supra*, 134 S.Ct. 2473.) However, the instant case does not involve an exception to the warrant clause, as was the case in *Riley*. Rather, it involves a specific probation condition imposed by the trial court that restricts the exercise of the constitutional rights of defendant, who must be supervised for the rehabilitation and prevention of crime. (See *Carbajal*, *supra*, 10 Cal.4th at p. 1120.)

B. *Analysis*

Here, as noted *ante*, defendant does not object to the search of his "person, vehicle, residence, property [or] personnel effects." Nor does he object to the conditions requiring him to "[o]bey all laws"; provide DNA samples; report any change of address or employment within 72 hours; provide his true name, address and date of birth if contacted by law enforcement; obtain his probation officer's consent before leaving

San Diego County; participate in treatment, therapy and counseling; provide written authorization for his probation officer to "receive progress and/or compliance reports from any medical/mental health care provider, or other treatment provider rendering treatment/services per court order"; and obtain approval as to "residence [and] employment" from his probation officer, among many other conditions.

In light of defendant's objection only to the search of "computers and recordable media," it is clear he recognizes his extensive criminal and substance abuse history justify a full Fourth Amendment waiver to prevent future criminality. (See *Olguin*, *supra*, 45 Cal.4th at p. 380.) Logically, if there is a valid need to search his "person," "vehicle" or even his "personal effects," by the same logic we fail to comprehend why that need would also not potentially include the search of electronic devices, particularly where information regarding his activities might well be stored and when defendant's privacy concerns are equally, if not more, implicated in connection with the Fourth Amendment waiver of his "residence," which he does *not* challenge on appeal.

On this record, we independently conclude the Fourth Amendment waiver as it applies to defendant's computers and recordable media is reasonable and not overbroad because defendant requires, or will require, strict supervision on probation. Indeed, as summarized *ante*, defendant repeatedly has violated probation and engaged in criminal activity. In fact, at the time of the instant offense, he was on summary probation in three separate cases. As also summarized *ante*, defendant violated parole "several times" and even after his discharge in January 2013, he continued to commit new crimes.

Of specific concern, defendant in 2014 and 2015 had multiple arrests for possession of controlled substances. He also has been to four residential treatment programs, with limited success. Despite his history of substance abuse and the possibility defendant will be released to a residential treatment program after serving time in local custody in connection with the instant case, the probation report states that defendant "is not interested in obtaining treatment."

Because defendant's probation officer has a compelling need to monitor the activities of defendant, particularly when there is a need to prevent him from reoffending as he has done so often in the past (see *Olguin*, *supra*, 45 Cal.4th at p. 380), we independently conclude the extension of the Fourth Amendment waiver to defendant's computers and recordable media was reasonable and proper. We further independently conclude the privacy concerns expressed in *Riley*, *supra*, 134 S.Ct. 2473 are inapposite to this case where there is a legitimate basis for a waiver of Fourth Amendment rights.

DISPOSITION

The judgment of conviction is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.